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Emergency Streamflow for Fisheries Bill 2009

Introduction

Sharing water in drought emergencies to sustain "important" fisheries, spawning and fish-rearing habitats is a fair and beneficial use of water. It is in the economic and social interest of Montanans to provide protection in the form of law for a reasonable minimum in-stream flow of water under the present, "first in time, first in right" water appropriation system. It would be an effective and efficient method of satisfying the public trust in water sharing during drought emergencies. Montana law recognizes fish and wildlife are valid beneficial uses for in-stream and in-lake appropriations of water.

Solution

The solution to low streamflows due to dewatering is to provide for real protection of important fisheries without significantly impacting legal water-rights. This law amends the "use it or lose it" water-right laws, validates the State's claim to water-rights for in-stream flows and protects irrigator's right to leave water in streams, that is, not to entirely use up their share while their water-right is still secure. When a fishery is destroyed by dewatering or thermal pollution, it may take eight years for the aquatic life to naturally re-establish sufficiency for fish to reasonably live in a stream. Whereas an irrigator called to cut back on crop irrigation, may only have one diminished harvest rather than a total loss for that growing season.

Average Annual Flow

The Average Annual Flow (AAF) is derived from streamflow volume data compiled by the US Geological Survey (USGS) in Montana for the past 107 years. The water measuring year is from October 1 to September 30, with the latest data subsequently finalized in April and then compiled with water measurements from the past, thereby deriving the streams AAF in measurements of cubic feet per second (CFS.)

The AAF is upgraded each year with data that is already one year old. Such a time lag (one year) removes the data from possible illegal manipulation and allows the streamflow scientists in USGS (or successor federal agency) not only time to collect data, but to analyze and compile the AAF of the specific stream. This information is readily available to the public over the USGS website. These latest streamflow measurements coordinated with past data result in correct and relevant Average Annual Flows for specific streams where gauging systems exist.

Information gathered in the Montana State Department of Fish, Wildlife and Parks inventory of year-round flowing streams east of the continental divide set a minimum CFS flow for the protection of fisheries and the aquatic life the fish depend upon. This research conducted in Montana has revealed that twenty-five percent of the AAF is the minimum necessary to sustain a native fishery in a year-round flowing stream while limiting the impact on water-right holders.

Public Trust

The Emergency Streamflow for Fisheries bill derives its foundation under the public trust. The public trust is common law doctrine that is responsible for establishing the North American Model of Fish & Wildlife Management. It established a set of ethical, economic and social values set into an operating social contract by way of a code of principles and management, which protect fish and wildlife habitats. Streamflows have been inadequate to support important fisheries and fish-rearing habitats have been degraded by water allocations without regard for native fish or anglers. Free-ranging wildlife on private land is owned and managed by the state, and its harvest is licensed by the state in the public trust. This sets a precedent that applies to flowing water. The Montana constitution states that the flowing waters and its aquatic life is owned by the state and allocated and managed by the state in the public trust.

Legal Basis

Montana's constitution assures a fundamental right to a clean and healthful environment. This should protect adequate streamflows to sustain healthy streams and fisheries during low water conditions in drought emergencies. Legislation to institute regulatory measures can be used to protect adequate streamflows. Important fisheries have an intrinsic water-right, therefore a reconsideration of water-right allocations must be made. Junior water-right holders may be the first to curtail water use while retaining "first in time, first in right" water laws. A base in-stream flow of twenty five percent of the Average Annual Flow is in the public interest and research has shown is the minimum necessary to sustain a native fishery.

- This will sustain natural fisheries for future generations.
- This will sustain a minimum streamflow to avoid a common pollution consequence of destructive thermal warming due to low flows.
- It may contribute to a supply of water for crops and livestock.
- There is a public interest and private interest in using state waters for beneficial uses.

The Montana Supreme Court on September, 24, 2002, delivered an opinion stating, "Montana law prior to 1973 does not require a diversion for a valid appropriation of water." Montana State claims to water for streamflows are valid for fish. The Court also said "those uses are equal with irrigation when adjudicating water-rights on a river, stream, pond, or lake." This ruling reverses the 1988 Bean Lake decision that implied the law did not recognize water-rights for native fish.

- The Emergency Streamflow for Fisheries Bill applies only to year-round flowing streams listed on FW&P May 1, 2005 inventory of dewatered streams, which include only those streams that support important fisheries, spawning and fish-rearing habitats.
- The Emergency Streamflow for Fisheries Bill would take no authority away from District judges, Water Courts, Water Commissioners, Water Masters, ditch companies or ditch riders, nor from any legal system that manages water-rights. Authority is rested in their legal judgments to control all water diversions. When an individual stream reaches a low flow of 25% of the AAF, then Water Commissioners would begin limiting water diversions—from junior water-right holders—so that 25% of the AAF remains in the stream to sustain fisheries. FW&P game wardens would NOT be involved. Enforcement is in the authority of the existing water-rights management systems.
- No additional water management personnel and no new gauging stations need be installed. The existing water-right management system will be responsible for assuring that 25% of the AAF remains in the stream to support important fisheries.

Dewatered Streams Inventory

Montana State Department of Fish, Wildlife and Parks (FWP) has inventoried, periodically updates, and maintains a Dewatered Streams List which includes only streams that support important fisheries and provide spawning and rearing habitats. In May, 2005 the list revealed that 4,700 miles of important fisheries are either chronically or periodically dewatered each year—impacting streams to the point where streamflow is not adequate for fish. Fish either move out or die. Dewatered streams may result in such low flows that high water temperatures result in thermal pollution—killing fish and the insect life on which they depend, impacting fisheries for many years.

Native fish, and the taking of fish for food and sport, pre-date modern man's diverting of water, therefore it would not be a taking of private property to retain a minimum of twenty-five percent of the average annual flow to sustain native fish within important fishery habitats. Angling may be considered an older use than irrigation in Montana. No additional funding is needed to manage and enforce this law.

Insurance Policy

The Montana State Department of Natural Resources and Conservation shall purchase an insurance policy to cover losses for any water right holder and establish a claim process for compensation. Funding for the purchase of insurance will be established from a special fund for this purpose.